LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 20 1963
JOHN F. DAVIS, CLERK

No. 541

In the

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,
Petitioner,

v.

H. N. BORDEN,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

REPLY BRIEF FOR PETITIONER

L. N. D. WELLS, JR.,
DAVID R. RICHARDS,
CHARLES J. MORRIS,
1601 National Bankers Life Building,
Dallas 1, Texas,
Counsel for Petitioner.

Of Counsel:
MULLINAX, WELLS, MORRIS & MAUEY

WARLICK PRESS, INC.—2000 VALDINA STREET—DALLAS—RI 1-2000

SUBJECT INDEX

	Page
I. Misconstruction of Facts by Respondent	1-4
II. Respondent Misconceives the Scope of Sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act	4-7
III. Section 14(b) is No Part of This Case	7-9
IV. Respondent Misconstrues GONZALES and GARMON	9-11
Appendix A	1a
Appendix B	1b

	Page
Garmon case, 359 U. S. 236 (1957)	9
Gonzales case, 356 U. S. 617, 632	9
Local 568, Hotel Employees Union (Warwick Hotel), 141 NLRB No. 29	6
Operating Engineering Local 624 A-B (D. S. McClanahan & Son), 141 NLRB No. 57	6
Radio Officers', 347 U. S. 17 (1954)	5
Teamsters Local 357 v. NLRB, 365 U. S. 667, 676	7
United Construction Workers v. Laburnum, 347 U. S. 656 (1954)	10

No. 541

In the

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

REPLY BRIEF FOR PETITIONER

I. Misconstruction of Facts by Respondent

1. Respondent contends "[t]his is not a wrongful hiring hall * * * case." (Resp. Br., p. 3.) Yet, he characterizes his complaint as follows:

> "He has been denied wrongfully, maliciously and arbitrarily, his valuable union rights, i.e., to be referred to the bank job as was the practice of the union, by the simple expedient of refusing to issue a job referral sending him to the job site." (Resp. Br., p. 25.)

2. Although respondent contests petitioner's statement that the jury found against Borden on his claim of denial of membership rights (Special Issue No. 3, R. 63), respondent admitted that he was and still is a member of Local 100 (Resp. Br., p. 6 and ¶ II of Amended Petition, R. 11).

3. Petitioner alleges that he "never did go to the project and ask for a job from Farwell" (Resp. Br., p. 8), and that "He never requested employment directly of Farwell * * *" (R. 19), however, plaintiff's witness, job foreman Thurman, testified:

> "Mr. Borden called me and told me he was here in town and wanted to know if I had a place I could use him, and I said, 'Yes, if you get a referral, come on down.'" (R. 144.)

4. Respondent rejects the four possible reasons advanced by petitioner for refusing to refer Borden, but suggested that

> "Thurman's testimony furnishes another reason. Lanham told him that Borden was not going to work on the bank because 'he shoved his card down our throat.' (p. 145) Thus, the reason was because Borden was trying to exercise his union rights."

We submit that such reason is the same as petitioner's reason number (2): Union policy of favoring Dallas residents; but in any event, it is a reason encompassed within the scheme of the National Labor Relations Act, and a reason which in the final analysis would have to be determined and evaluated by the N.L.R.B.

5. Throughout its brief, respondent alleges that "The union was not a certified bargaining agent." (Resp. Br., pp. 11, 2, 20.) Whether it was certified under Section 9(c) of

the Act or merely a representative of a majority of the employees in an appropriate unit under Section 9(a) is of course immaterial.

6. Respondent alleges that he

> "* * * does not complain of any illegal hiring hall system or action of Farwell * * *" (R. 10),

that

> "No attempt was made to cause a prospective employer to discriminate against Borden for the purpose of encouraging or discouraging union membership. The prospective employer was not a party to the suit nor was it involved in any way * * *" (R. 12),

and that

> "The action of the union in refusing to refer Borden was unilateral. No showing is made as to any effect on Farwell." (R. 17.)

Yet Borden himself testified: "I was working for the company and was coming in here to still continue to work for the company * * *" (R. 84); the jury found that Farwell had promised Borden a job (R. 62, Resp. Br., p. 22); and the Court of Appeals gave this summary of what happened next:

> "In the meantime, according to A. G. Thurman, foreman of the Bank project, *Borden had called him, stating that he was in town, desiring a job* and had placed a clearance card with Local 100. Thurman saying 'if you get a referral come on down' that *he (Thurman) later called Lanham requesting that Borden be referred to the Bank project*, to which Lanham replied 'I am not about to send that old S-O-B down there. He shoved his card down our throats and I am not about to send him to the Bank.
>
> * * * * *

"It is rather difficult to follow appellants' argument that 'Lanham had no duty to refer Borden to the job site requested' in view of its established policy, that once a request is made by an employer for a specific employee, that person is immediately referred to the job site. That *this was the uniform practice* is explicit in the testimony of foreman Thurman; he stating that in obtaining employees he would place calls with Local 100 which is 'the end of my obligation in getting a man on the job'; further testifying that *all employees hired by him came through the union office*; answering 'No, Sir' to the question 'Have you ever hired anyone on the job except through Union referral, as is the custom here'; and the record as hereinabove narrated, in our opinion constituted *sufficient proof that respondent was willfully denied a job opportunity to which Lanham knew he was entitled* to under the rules and procedures established by petitioners for allocating work among their members." (R. 353, 354, emphasis added.)

7. Respondent's unsupported reference to "abusive threats made to Borden that put him in fear of bodily harm . . ." (Resp. Br., p. 15) refers to events which occurred a full year after the union refused to refer him to the bank job, after that job was already completed (R. 353), and after he had employed an attorney and threatened a law suit (R. 130-131, R. 136).

II. Respondent Misconceives the Scope of Sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act

Respondent makes his stand on the proposition that the union's conduct did not violate the federal statute (Resp.

Br., p. 16). He applies a literal and limited reading of Section 8(b)(2) to conclude:

> "In the absence of a union right or supposed right of control, *under a collective bargaining agreement* enforced against the employer *by a certified bargaining agent, or threat by a union against the employer*, in either event causing employer discrimination to encourage or discourage union membership, there is no Sec. 8(b)(2) violation." (Resp. Br., p. 20, emphasis added.)

This view of course ignores *Radio Officers', 347 U. S. 17 (1954)*, and a long list of NLRB and court decisions, many of which are cited in our original brief (Footnote 23). If respondent is right in his contentions of fact, then the union's refusal to refer him to the bank job was certainly because he engaged in protected concerted activity. As this Court wrote in *Radio Officers', 347 U. S. 17, 31*:

> "Thus the Board concluded that the union, by refusing to clear Fowler in both February and April, restrained and coerced Fowler in *his statutory right to refrain from observance of the union's rules*, and caused the company to discriminate against Fowler by denying him employment." (Emphasis added.)

But respondent's misconception as to the scope of the federal proscription is no more at variance with settled law than is the view of the Texas Court of Appeals whose opinion casually dismissed petitioner's pre-emption argument with this observation:

> "By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member." (R. 351.)

At the risk of belaboring the obvious, petitioner has appended two recent and yet unpublished NLRB decisions which illustrate that Borden's hiring hall complaint is common grist for the NLRB mill: *Local 568, Hotel Employees Union (Warwick Hotel), 141 NLRB No. 29*, March 11, 1963 (Appendix A, attached hereto), holding that a union violated Section 8(b)(2) by refusing to refer a suspended member to an employer who has a "practice" of calling the union for employees; *Operating Engineers Local 624 A-B (D. S. McClanahan & Son), 141 NLRB No. 57*, March 20, 1963 (Appendix B, attached hereto), holding that a union violated Section 8(b)(1)(A) and 8(b)(2) when the employer, not a party to the case, failed to employ a dissident union member whom the union had refused to refer, where there was a "general practice to call the respondent for men and to require that they produce a referral slip as a condition to obtaining work. * * *" In the latter case, the Board required no overt act by the employer, but held the union's conduct in refusing to refer the dissident member to be an unfair labor practice because the member had "engaged in protected concerted activities, i.e., his opposition to incumbent officials of Respondent. * * *"

Whether petitioner in fact was guilty of violating these Sections is a determination which only the Labor Board is authorized to make. Neither the Texas Court nor this Court has statutory power to make that finding. Clearly, however, the activity herein is "arguably subject to § 7 or § 8 of the Act" and in no sense peripheral to the area which the Act regulates. If the conduct was not an unfair labor practice,

then it is all the more reason for the state courts to avoid regulation herein. Since "Congress has adopted a selective system for dealing with evils, the Board is confined to that system. * * * Where, as here, Congress has aimed its sanctions only at specific discriminatory practices [affecting hiring halls], the Board cannot go further and establish a broader more pervasive regulatory scheme." *Teamsters Local 357 v. NLRB*, 365 U. S. 667, 676. And of course the state courts cannot go further either.

Respondent has inadvertently pointed up the rationale of federal pre-emption when he asks:

> "Assuming a matter to be of peripheral concern to the Act does the union suggest that in referring such matters to the Labor Board it has expertise in traditional concepts of contract and tort law and its application in all fifty states?" (Resp. Br., p. 37.)

In the first place, the matter herein cannot be of peripheral concern, for the state court has regulated no conduct save that which the Labor Board is empowered to regulate. Secondly, if the Labor Board's remedy is different, it but emphasizes the danger inherent in a doctrine that would permit fifty different states to apply their respective expertise to a matter as to which Congress has decreed uniformity both as to remedy and as to forum.

III. Section 14(b) is No Part of This Case

Respondent now alleges that his action is in part "based on the Texas Right to Work Law (Article 5207a, Revised Civil Statutes of Texas, specifically allowed by Sec. 14(b) of the Labor Management Disclosure Act of 1959 (sic). * * *"

(Resp. Br., p. 27,) Section 14(b) of the Labor Management Relations Act of 1947 is no part of this case. The Texas' appellate courts have not treated this case as an action based on state statute. The Texas Court of Appeals held that Borden's "case is based on allegations involving both tort and contract" (R. 348); and made no mention of the Texas "Right-to-Work" statute. And at page 15 of his brief, respondent advises that "This is an action under state law sounding both in contract and in tort." In addition, there were no jury special issues to support a violation of the so-called "Right to Work Law."

If Article 5207(a) of the Texas statutes were involved,[1] it could only be Section 1 thereof, which does not meet the requirements of Section 14(b) of the federal statute but rather relates to individual and collective bargaining, subjects which are clearly pre-empted by Sections 7 and 8 of the federal statute.

---

[1]The Texas statute contains three operative sections, viz:

"Section 1. The inherent right of a person to work and bargain freely with his employer, individually or collectively for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature.

"Sec. 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

"Sec. 3. Any contract which requires or prescribes that employees or applicants for employment in order to work for an employer shall or shall not be or remain members of a labor union, shall be null and void and against public policy. The provisions of this Section shall not apply to any contract or contracts heretofore executed but shall apply to any renewal or extension of any existing contract and to any new agreement or contract executed after the effective date of this Act."

Sections two and three could not be relevant in this case; for (2) relates to denial of employment on account of membership or non-membership in a labor union; and Borden was a union member; and (3) makes void as against state public policy certain contracts. But as respondent acknowledges (Brief, p. 10) there is no attack upon the contract.

In any event, this case exemplifies the note of warning issued by the dissenters in the *Gonzales* case *(356 U. S. 617, 632)*:

> "• • • the presence or absence of pre-emption is a consequence of the effect of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading."

IV. Respondent Misconstrues GONZALES and GARMON

Respondent asserts that "Only a cursory examination of the opinion in *Garmon* shows that the Court specifically upheld its previous holding in the • • • [*Gonzales*] case." (Resp. Br., p. 36.)

If the examination is more than cursory it appears that in *Garmon, 359 U. S. 236 (1957)*, the majority directly referred to *Gonzales, 356 U. S. 617 (1958)*, only twice. First, to emphasize the "Delphic nature" of the problem, *359 U. S. at 241*, and second, to note an exception to the rule of pre-emption "here the activity regulated was a merely peripheral concern of the Labor Management Relations Act." *359 U. S. at 243-244.*

That which was held in *Gonzales* to be "peripheral" to the federal scheme of regulation was controversy between member and union as to expulsion from union membership. Borden's case is different; he seeks no reinstatement in the union, for he acknowledges he is a member (Brief, p. 6, footnote 13, "it is admitted that he was a member of Local 100 and that his clearance car had been accepted on October 9,

1953." Borden's complaint concerns only union interference with his employment by Farwell; a matter central to the federal regulatory scheme.[2]

Accordingly, this dispute is for federal, not state, determination. Alternatively, it is, at least, for *initial* federal determination, else the states play havoc with the federal regulation. See our original brief, pp. 30ff.

If, after a federal determination that the questioned conduct is on the periphery of the federal regulation, such conduct may then be regulated by the states (e.g. violence, as in *Laburnum*; or restoration to membership, as in *Gonzales*) there yet remains the danger that the state remedy may subvert the federal purpose. For *Garmon* observed (in denying California the power to award damages for conduct that the federal Act permitted the federal tribunal to restrain only) that:

> "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *359 U. S. at 247.*

---

[2] The majority in *Gonzales* was focusing upon the central problem in Gonzales' case—the reinstatement to union membership of a member wrongfully expelled. Damages were there viewed as incidental to the primary remedy of reinstatement. The Court then considered the propriety of the state's power to "fill out the remedy," 356 U. S. at 620-621. The majority ignored the circumstances which gave rise to damages for loss of wages (although the dissent discussed this aspect, 356 U. S. at 626-627) and referred to the possible violation of the federal law only in conjectural terms; viz: "In such a suit there *may be* imbedded circumstances that *could* constitute an unfair labor practice under 8(b)(2) of the Act." *356 U. S. at 619.* (Emphasis added.)

[3] *United Construction Workers v. Laburnum, 347 U. S. 656 (1954).*

[4] *Laburnum* and *Garmon* recognized as much for this court was careful to note in *Garmon* that in *Laburnum* the state afforded redress for the violent conduct (an activity subject to state regulation) *only to the extent of awarding "damages directly and proximately caused by wrongful conduct (violence) chargeable to the defendants"*; and emphasized that "* * * *there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.*" *359 U. S. at 249*, footnote 6. (Emphasis added.)

Accordingly, if there remains vitality to *Gonzales*, and if a state may award damages with respect to conduct at the periphery of the federal regulation, the remedies which the states may impose for such conduct should be limited to compensation for the activity which the state may control. Otherwise, as in the instant case, where the state awards Borden his actual damage doubled by a "smart money" award, the state remedy becomes "a potent method of governing conduct and controlling policy."

Respectfully submitted,

L. N. D. WELLS, JR.,
DAVID R. RICHARDS,
CHARLES J. MORRIS,
1601 National Bankers Life Building,
Dallas 1, Texas,
Attorneys for Petitioner.

APPENDIX A

141 NLRB No. 29 D-5194 Philadelphia, Pa.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 4-CB-800

LOCAL 568, HOTEL, MOTEL & CLUB EMPLOYEES UNION, AFL-CIO

and

SYDNEY AXELROD, An Individual

and

WARWICK HOTEL, INC.,

Party to a Contract

DECISION AND ORDER

On October 18, 1962, Trial Examiner Sydney S. Asher, Jr., issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and had not engaged in others and recommending that it cease and desist from the unfair labor practices found and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter Respondent and General Counsel filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case and finds merit in General Counsel's exceptions. Accordingly, the Board adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent that they are consistent with the following:

1. General Counsel alleged in his complaint that Respondent caused hotels in the Philadelphia area to refuse to employ Sydney Axelrod as an extra banquet waiter in violation of Section 8(b)(2) of the Act by virtue of an unlawful arrangement, understanding, and practice between Respondent and the hotels requiring that such waiters be referred to jobs or cleared for employment by Respondent as a condition of employment, and the refusal of Respondent either to refer Axelrod to jobs or approve his employment by the hotels. The Trial Examiner rejected this allegation and found that, although the hotels did generally use Respondent's facilities for recruiting extra banquet waiters and did refuse to employ Axelrod in the absence of referral by Respondent, the practice was not violative of Section 8(b)(2) because it was not "bilateral or caused by contractual compulsion, but was unilateral and voluntary, and was followed primarily because it suited the hotels' convenience." We do not agree.

For many years prior to October 1959, Respondent and hotels in the Philadelphia area were parties to collective-

bargaining agreements which provided specifically for a closed shop and exclusive hiring through Respondent. During this period, the hotels complied with the contract requirement and recruited extra banquet waiters in the first instance through Respondent's banquet department hiring hall. As the result of the Supreme Court's decision in *Hotel Employees v. Leedom*, 358 U. S. 99, the Board in July 1959 reversed its previous policy of not asserting jurisdiction over hotels and set forth the standards which would govern in the assertion of jurisdiction over such establishments.[1] Following this decision, Respondent and the hotels negotiated a new bargaining contract in October 1959 which eliminated the closed shop and exclusive hiring clauses and substituted therefor a statutory union-shop clause and a provision which reads:

> 2. When in need of employees, EMPLOYER may apply to the office of the UNION. Said UNION agrees, during the term hereof to, at all times, maintain an office in Philadelphia, which shall be open during ordinary business hours, and shall communicate to EMPLOYER the address of said office * * *.

In bargaining contracts with hotels which are not subject to the Board's jurisdiction, the pre-1959 closed shop and exclusive hiring provisions have been continued.

Despite changes in the 1959 bargaining agreement, and except for a 3-month period of confusion which followed the signing of the 1959 contract, the hotels have continued their former practice of hiring extra banquet waiters, with the possible exception of Negro waiters, only if they have been requested from, and referred by, Respondent. Thus, when the

[1] *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261.

Charging Party, Sidney Axelrod, an experienced extra banquet waiter and longtime union member, was suspended from union membership and denied referrals from Respondent's banquet department hiring hall for alleged "dereliction of duty, embarrassment to the Union, causing internal strife, and publicizing the action of the Union to outsiders," several hotels refused to consider him for employment at his trade with the explanation that they obtained extra banquet waiters solely through Respondent.

Notwithstanding the statements made to Axelrod by several hotels in refusing to consider his application for employment, the Trial Examiner found that the pre-October 1959 exclusive hiring practice was no longer in effect. He predicated this finding on the testimony of Joseph P. Hoemig, general manager of five Philadelphia hotels, that there have been occasions since 1959 when at least two hotels have hired extra banquet waiters through the Committee on Human Relations. However, the instances of hiring through the Committee involved only Negro waiters. Hoemig's testimony was nothing more than that on a few occasions such extra banquet waiters had been recruited through the Committee when the customer had specifically asked that such waiters be employed. There is not the slightest evidence that this relaxation of the preexisting contract requirement and practice has been otherwise extended. This single exception does not prove that the practice of exclusive hiring through the Union has been abandoned. In fact, Hoemig's testimony considered in its entirety is to the contrary.[2]

[2] *N.L.R.B. v. Local 369, Hod Carriers*, 240 F. 2d 539 (C.A. 3); *Local 215, International Brotherhood of Electrical Workers*, 136 NLRB No. 137; *Nassau & Suffolk Contractors' Association, Inc.*, 118 NLRB 174.

Accordingly, we find, contrary to the Trial Examiner, that except on several occasions as heretofore indicated, the hotels have since October 1959 continued their former practice of hiring extra banquet waiters in the first instance exclusively through Respondent.

The Trial Examiner also found that, assuming the hotels had continued their former illegal practice of hiring exclusively through Respondent, the General Counsel had failed to establish that such rigid practice resulted from a bilateral understanding in which Respondent had participated or from pressure exerted upon the hotels by Respondent. In making this finding, the Trial Examiner relied upon the testimony of witnesses for the hotels and Respondent that there was no contractual obligation requiring the hiring of extra banquet waiters through Respondent. However, in order to establish equal responsibility of Respondent with the hotels for the latter's illegal practice of hiring only through Respondent, it is not necessary to establish an explicit agreement for such hiring. An understanding, even though not articulated, is sufficient to make the union responsible with the employer for the unlawful practice.

In accepting at face value the disclaimers by the participants in the alleged illegal understanding, agreement and

---

Respondent's president, Stoltz, testified that the hotels had, beginning in early 1960, resumed their former practice of recruiting through Respondent. The Trial Examiner refused to credit Stoltz because he found him not a credible witness and his testimony was not corroborated by hotel officials.

However, the testimony as to the remarks made by hotel officials in refusing to consider Axelrod for employment does corroborate Stoltz. Hoemig's testimony, discussed above, treats of an exception; it does not serve to discredit the continuance of the preexisting practice. In these circumstances and for the reasons set forth, we believe Stoltz's testimony in this respect reflects the actual practice of the parties.

practice, the Trial Examiner failed to give proper weight to certain implications in the adduced testimony. It is no doubt true that it was convenient for the hotels to have a single source of supply for extra banquet waiters. But it does not follow that it was equally convenient for a hotel to reject a qualified waiter who applied directly to the hotel for a job at a time when a job was available. Significantly, in refusing to consider Axelrod's application for employment, the hotels made clear that they did so not because there were no jobs then available, but because referral from Respondent was a condition precedent to employment. Thus personal application for a job at any time, except in the contingency that Respondent could not supply necessary extra help, was a futility.

In evaluating the basis for this practice, the Trial Examiner also neglected to consider the origin of the practice. For many years the hotels had been required by contract to hire exclusively through, and to employ only members of, Respondent. In deleting the closed shop and exclusive hiring clauses from the 1959 contract, the parties inserted a provision which obviously contemplates that Respondent would continue to operate a hiring hall. The hotels subject to the Board's jurisdiction must have been aware that purely local hotels were still required to do their hiring of extra banquet waiters through Respondent. There is no evidence that in deleting the illegal hiring clause, Respondent took any steps to assure the employers that the illegal hiring practice was in fact abolished and that the employers were free to recruit extra banquet waiters from any source, subject only to the

lawful union-security requirement. When to these circumstances there is added the fact that Respondent had a rule prohibiting its members from working with union or nonunion members not booked through its hiring hall,[1] it is understandable why the hotels should have continued substantially unchanged the illegal practice of hiring only extra banquet waiters referred by Respondent.

We hold, contrary to the Trial Examiner, that the continuance after October 1959 of the hotels' practice of hiring extra banquet waiters in the first instance exclusively through Respondent was not solely voluntary, but was caused by an agreement or understanding with Respondent to con-

[1] The precise nature of the rule against working with other employees is in dispute. Axelrod and another witness for the General Counsel testified that at a union membership meeting in September 1961 a resolution was passed that members of the banquet department were not to work with nonunion members or with union members not booked through Respondent's hiring hall. Stoltz, president of Respondent, testified that each year a resolution is passed that members shall not work with other members of the banquet department if they have not obtained their employment through Respondent's hiring hall. According to Stoltz, the no-work resolution does not apply to working with nonunion members or suspended members who may have obtained their employment through other sources. The Trial Examiner credited the Stoltz version of the rule in large part because of Hoemig's testimony as to the employment of Negro waiters discussed above. Contrary to the Trial Examiner, we credit the version of the rule testified to by the witnesses for the General Counsel. We do so because this version is more in accord with customary union practice, and because on two occasions, in the fall of 1961, extra banquet waiters supplied by Respondent refused to work with both union and nonunion waitresses not booked through Respondent, which is consistent with the General Counsel's version of the rule. (The Trial Examiner refused to give probative weight to either of these incidents for reasons which we regard as invalid. The incidents are considered here as evidence corroborative of the General Counsel's version of the disputed union resolution.)

Even the Stoltz version of the rule would seriously handicap any hotel which tried to recruit waiters otherwise than through Respondent. This club over the hotels would be only slightly less potent in the Stoltz version than in the General Counsel version.

Although there is no direct evidence in this record that the hotels were aware of the union resolution, such knowledge is inferrable from the long standing relationship between the hotels and Respondent, the public nature of the resolution, its existence for a number of years, and the work stoppages.

tinue the preexisting practice which was reinforced by the knowledge that as a result of a union resolution waiters booked through Respondent would not work with waiters obtained elsewhere. We find, therefore, that by refusing for discriminatory reasons to consider Sydney Axelrod for referral as an extra banquet waiter, Respondent caused hotel employers to discriminate against him in hiring, thereby violating Section 8(b)(2) and (1)(A) of the Act.[5]

2. The General Counsel also alleged that Respondent had independently violated Section 8(b)(1)(A) of the Act by failing, in making job referrals, equally to represent Axelrod, a member of the bargaining unit for which Respondent was bargaining representative. The Trial Examiner found a violation substantially as alleged in the complaint. As we have found above that Respondent violated Section 8(b)(2) and (1)(A) of the Act, and the remedy for any further violation of Section 8(b)(1)(A) will be the same as for the violations already found, we consider it unnecessary to, and do not, pass upon this finding of an independent 8(b)(1)(A) violation.

The Remedy

Having found that Respondent engaged in certain unfair labor practices violative of Section 8(b)(2) and (1)(A), we shall direct that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[6] We shall direct that Respondent restore

[5] *Local 215, International Brotherhood of Electrical Workers, AFL-CIO, 136 NLRB No. 137.*

[6] Member Rodgers, in addition to the provisions set forth in the Board's Order, would also specifically order the Respondent to cease and desist from continuing its unlawful hiring practices.

Sydney Axelrod to that position on the job roster of the banquet department to which he would be entitled if no discrimination had been practiced against him, and to refer him to jobs without discrimination. Respondent shall also make Axelrod whole for any loss of earnings suffered by him as the result of Respondent's unlawful conduct toward him by payment to him of a sum of money equal to that which he would have earned from on or about March 8, 1962, the date of the discrimination against him, until such time as his name is restored to the roster of the banquet department and he is referred to available employment without discrimination.[1] Loss of earnings shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be addedto moneys due Axelrod to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.[2]

Additional Conclusion of Law

By removing Sydney Axelrod's name from the roster of the banquet department and by thereafter refusing to refer him to jobs as an extra banquet waiter with employers seeking such employees, including *inter alia*, members of The Philadelphia Hotel Association of Philadelphia, Pennsylvania, Respondent caused such employers to discriminate

[1] If after referral, any hotel, for reasons not caused by Respondent, would have refused to hire Axelrod, Respondent will not be obligated to reimburse him for loss of earnings suffered thereby.

[2] For the reasons stated in their dissenting opinion in *Isis Plumbing & Heating Co., supra*, Members Rodgers and Leedom would not award interest.

against him in violation of Section 8(a)(3) of the Act, and thus coerced and restrained employees in the exercise of rights guaranteed in Section 7 of the Act, thereby violating Section 8(b)(2) and (1)(A) of the Act.

ORDER

The Board adopts as its order the following in substitution for the "Recommendations" of the Trial Examiner.

Upon the entire record in the case and pursuant to Section 10(c) of the Act, as amended, the National Labor Relations Board hereby orders that Respondent Local 568, Hotel, Motel & Club Employees Union, AFL-CIO, Philadelphia, Pennsylvania, it officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause employers in the Philadelphia area, including members of The Philadelphia Hotel Association of Philadelphia, Pennsylvania, to refuse employment to Sydney Axelrod, or any other individual, in violation of Section 8(a)(3) of the Act.

(b) In any other manner restraining or coercing employees of employers subject to the Act in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Restore Sydney Axelrod to the employment roster of the banquet department, refer him therefrom for employment as an extra banquet waiter on a nondiscriminatory basis and make him whole for loss of earnings suffered as

the result of the discrimination against him, in the manner indicated in the section of this Decision and Order entitled "The Remedy."

(b) Post at its business offices, meeting, and hiring halls in Philadelphia, Pennsylvania, copies of the notice attached hereto marked "Appendix."* Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Fourth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. March 13, 1963.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

*In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX B

141 NLRB No. 57 D-5166
Columbus, Miss.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 26-CB-165

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 624 A-B (D. S. McClanahan & Son, Inc.)

and

ROBERT WALKER, An Individual

NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On June 13, 1962, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. He also found that the Respondent had not engaged in other unfair labor practices and recommended that the complaint be dismissed as to them. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent that they are consistent with our Decision herein.[2]

The complaint alleged that Respondent maintained and enforced an arrangement, understanding, or practice with McClanahan requiring clearance or referral by Respondent as a condition of employment at McClanahan's project in Hamilton, Mississippi; that Respondent violated Section 8(b)(2) and (1)(A) by refusing to clear Robert Walker for employment with McClanahan in June of 1961 because he had opposed the election of incumbent Union officers; and, that Respondent further violated that Section by refusing to register Walker for employment with McClanahan and other employers on and after July 1, 1961, because of his engagement in the foregoing protected concerted activity. The Trial Examiner concluded that no exclusive hiring arrangement, understanding, or practice existed between Respondent and

[1]Respondent's request for oral argument is hereby denied as, in our opinion, the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

[2]Chairman McCulloch and Member Fanning, for the reasons set forth in the majority opinion in *Isis Plumbing & Heating Co., 138 NLRB No. 97*, include the payment of 6% interest per annum on the award of back pay ordered herein. However, for the reasons given in his dissent in that case, Member Rodgers would not grant any interest here.

McClanahan or any other employer. He therefore dismissed the complaint insofar as it alleged that Respondent violated the Act by refusing to register Walker for employment with McClanahan or any other employer after July 1. The Trial Examiner did find, however, that Respondent unlawfully discriminated against Walker when it refused to refer him for work with McClanahan on and after June 19 because of his intra-union activities.*

We adopt the Trial Examiner's finding that Respondent violated Section 8(b)(2) and (1)(A) by its refusal to refer Walker in June of 1961. We also agree that Respondent did

* The Trial Examiner's Intermediate Report contained the following:
"During 1961 Walker began a campaign to be elected as the Respondent's recording-corresponding secretary. The campaign, it developed, was to be a lengthy one and, as these pages are being written, it has not been concluded. On May 16, 1961, shortly before Walker sought employment with the Company, at a meeting at which candidates were to be qualified, Robert Byrd ruled that Walker was unqualified to run. The ground advanced then or later was that Walker had been in arrears in his dues and had not attended the necessary number of union meetings to qualify as a candidate. Later that month, Walker appealed to the Respondent's executive board. At about the same time, Speed suggested to Stanley Byrd that Walker be referred for employment with the Company, whose operations at the Hamilton project were to begin soon, and Byrd answered that, 'as far as Bobby Walker is concerned he can starve to death for my part.' On June 11, Walker lost his grievance before the Respondent's executive board. He promptly filed an appeal to the general executive board of the International Union. About June 20, the election was held. Walker's name was not on the ballot. Succeeding events, insofar as they need be recited, are that Walker enlarged the appeal by seeking to set aside the results of the election on the ground that he had been improperly disqualified as a candidate, the appeal was scheduled for hearing in Washington, D. C., Walker was notified but failed to attend, the general executive board denied the appeal on September 13. Walker filed a complaint with the Secretary of Labor under 29 U.S.C., Sec. 482, and about April 1962 the issues were settled by an agreement between the Respondent, the International Union, and the Department of Labor whereby the election of June 20, 1961, would be set aside, new nominations open to the membership of the Respondent would be made on May 15, 1962, and a new election would be conducted on June 19, 1962, for the unexpired terms of the officers who had been elected during June 1961."

not violate that Section by refusing to register Walker for employment with employers other than McClanahan because there is no record evidence that any exclusive hiring arrangement, understanding, or practice existed between Respondent and such other employers pursuant to which Walker was denied employment with them. Contrary to the Trial Examiner, however, we conclude and find that Respondent and McClanahan maintained and enforced a tacit arrangement or implicit understanding which required clearance or referral by Respondent as a condition of employment with McClanahan, and that Respondent acted unlawfully when it refused to register Walker for work with this employer after July 1.†

McClanahan is a subcontractor which employs operating engineers. The record shows that the entire project in question is a "union job," that is, only "union" craftsmen are employed. All operating engineers who worked for McClanahan at the project were members of Respondent. During the period from 1956 to 1959, McClanahan had dealt with Respondent on an exclusive basis. According to Speed, Respond-

†The Trial Examiner's Intermediate Report contained the following:

"The Respondent and the Company are not parties to a written collective labor agreement, and the testimony of their representatives is that they are not parties to an oral agreement covering the Company's operations at any project. Nevertheless, it is the Company's practice, whenever it is in need of engineers, to call the branch office of the Respondent nearest the project where men are needed. That practice, coupled with the fact that the Company required clearance by the Respondent for all engineers employed by it on the Hamilton project, will not, however, warrant a finding of unfair labor practices by the Respondent. The Company is not a party to this proceeding and is not alleged to have violated the Act."

ent's assistant business representative at that time. Respondent and McClanahan arrived at an oral agreement under which the latter agreed to contact Respondent whenever in need of operating engineers and to require that the engineers it then employed be members of Respondent. The agreement further provided that McClanahan would look exclusively to Respondent for the supply of men, and only when Respondent was unable to refer them was McClanahan permitted to seek employees elsewhere. Even in these circumstances, McClanahan was obligated to require that the new employees join Respondent.

When McClanahan commenced work on the Hamilton project in mid-1961, the manner in which it recruited operating engineers was strikingly similar to the agreement and practice with Respondent outlined above. Thus, even before McClanahan bid on the job, it inquired of Respondent about the availability of engineers. When the bid was let, McClanahan called Respondent about furnishing men. Respondent replied that "the Meridian office [Respondent's office in the area of the project] had always handled the furnishing of the people out there" and assured McClanahan that an agent "would look after that portion of it." McClanahan's project superintendent Forrester conceded that it was the general practice at the project to telephone Respondent's office when

---

As the Trial Examiner noted, Speed's testimony was not wholly clear as to the precise terms of the oral agreement reached between Respondent and McClanahan sometime during the period between 1956 and 1959. However, that testimony serves to corroborate the existence of the arrangement or practice which is shown by other evidence in the record.

in need of men, and to require that they produce a referral slip from Respondent as a condition of employment.

Against this array of record facts, we are hard-pressed to accept the Trial Examiner's conclusion that no arrangement, understanding, or practice existed pursuant to which Respondent became the exclusive source of supply of engineers for employment with McClanahan. In view of the facts that McClanahan obligated itself to look exclusively to Respondent for the supply of men from 1956 to 1959; that McClanahan requested that Respondent furnish engineers to staff the project requirements in mid-1961 and Respondent agreed to do so in the same manner that it "had always handled the furnishing of the people out there;" and that Respondent conceded it was the general practice to call the Respondent for men and to require that they produce a referral slip as a condition to obtaining work with McClanahan, we conclude that, at the very least, a tacit arrangement or implicit understanding existed between McClanahan and Respondent under which the latter functioned as the exclusive source of supply of engineers for the former. Accordingly, we find that, by refusing to register Walker for employment with McClanahan on and after July 1 because he engaged in protected concerted activities, i.e., his opposition to incumbent officials of Respondent, Respondent violated Section 8(b)(2) and (1)(A) of the Act.[4]

[4] *See Local 215, International Brotherhood of Electrical Workers, AFL-CIO (William De Paolo), 136 NLRB 1618; Cf. Columbia Broadcasting System, Inc., 119 NLRB 810.*

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner with the modifications listed marginally below.*

Dated, Washington, D. C., March 20, 1963.

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

*The Appendix attached to the Intermediate Report is hereby modified by deleting the words "60 days after its date" in the next to the last sentence of said notice and inserting in its place, the words "60 consecutive days from the date of posting * * *."

"Paragraph 1(a) of the "Recommended Order" and the corresponding portions of the Notice are hereby deleted and the following shall be substituted therefor:

"1. Cease and desist from:

(a) Causing or attempting to cause D. S. McClanahan & Son, Inc., or any other employer having a similar arrangement, understanding, or practice with Respondent, to refuse to hire a worker in violation of Section 8(a)(3) of the Act or otherwise to discriminate against employees or applicants for employment in violation thereof, or maintaining or enforcing any such arrangement, understanding, or practice under which workers are denied registration for employment with employers in violation of Section 8(a)(3) of the Act."